

STATE OF MICHIGAN
COURT OF APPEALS

MARK CHOLAK,

Plaintiff-Appellant,

v

CITY OF WESTLAND and CITY OF
WESTLAND ACT 345 PENSION BOARD,

Defendants-Appellees.

UNPUBLISHED

October 22, 2015

No. 322756

Wayne Circuit Court

LC No. 12-012717-CK

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right two trial court orders granting defendant City of Westland Act 345 Pension Board's ("the Board") motion for reconsideration, vacating the trial court order denying defendant City of Westland's ("the City") and the Board's motions for summary disposition, and granting the City's and the Board's motions for summary disposition. Plaintiff also appeals two orders denying his motions for reconsideration. On appeal, plaintiff argues that the trial court erred in granting the Board's motion for reconsideration and granting both defendants' motions for summary disposition.

This case involves a dispute regarding the proper interpretation of a collective bargaining agreement ("the CBA") between the City and plaintiff's union. The Board is responsible for managing retirement and pension provisions of the CBA. Plaintiff, a police officer for the City, disputes a decision reached by the Board relating to an early retirement provision of the CBA. Plaintiff brought a claim against defendants in the circuit court, and defendants both filed motions for summary disposition, arguing, in part, that plaintiff failed to exhaust administrative remedies pursuant to the CBA before filing suit. The trial court initially denied the motions because defendants failed to include the applicable grievance procedures with their motions. The Board then filed a motion for reconsideration, which included the grievance procedures. The trial court granted the motion for reconsideration, and further granted both the City's and the Board's motions for summary disposition. Plaintiff filed motions for reconsideration, which were denied. Plaintiff now appeals.

Plaintiff first argues that the trial court erred in granting defendants' summary disposition on the ground that plaintiff failed to exhaust his administrative remedies before filing suit. We disagree.

This Court reviews de novo a trial court's decision granting summary disposition under MCR 2.116(C)(10). *McLean v Dearborn*, 302 Mich App 68, 72; 836 NW2d 916 (2013). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

It is well-established that exhaustion of contractual grievance procedures is generally necessary to maintain a suit based on a breach of a collective bargaining agreement. *Sankar v Detroit Bd of Ed*, 160 Mich App 470, 474; 409 NW2d 213, 215 (1987); *Grosse Pointe Farms Police Officers Ass'n v MERC Chairman*, 53 Mich App 173, 178; 218 NW2d 801 (1974); see also *Mollet v City of Taylor*, 197 Mich App 328, 337; 494 NW2d 832 (1992). The policy reasons for the exhaustion of administrative remedies doctrine include:

(1) an untimely resort to the courts may result in delay and disruption of an otherwise cohesive administrative scheme; (2) judicial review is best made upon a full factual record developed before the agency; (3) resolution of the issues may require the accumulated technical competence of the agency or may have been entrusted by the Legislature to the agency's discretion; and (4) a successful agency settlement of the dispute may render a judicial resolution unnecessary. [*Bonneville v Mich Corrections Org*, 190 Mich App 473, 476; 476 NW2d 411 (1991), quoting *Int'l Business Machines v Dep't of Treasury*, 75 Mich App 604, 610; 255 NW2d 702 (1977).]

Here, the City and plaintiff's union entered into the CBA, subject to the police and fire civil service act, MCL 38.501 *et seq.* The Board was created to manage and operate the retirement and pension system of the CBA, pursuant to the Firefighters and Police Officers Retirement Act, 1937 PA 345, MCL 38.551 *et seq.*, a subset of the civil service act. The CBA provides an extensive grievance procedure. If the grievance is unresolved, the ultimate result is that the grieved party may request arbitration or appeal the matter to the civil service commission. It is undisputed that plaintiff failed to exhaust his administrative remedies provided by the CBA.

Plaintiff relies on the Firefighters and Police Officers Retirement Act to support his argument that he was not required to exhaust the grievance procedures in the CBA. The act sets forth the powers, duties, and regulations of retirement boards created pursuant to the act, including the Board at issue here. Plaintiff argues that MCL 38.555 provides a statutory basis for his suit. MCL 38.555 provides that a retirement board is "a quasi-judicial body, and its actions shall be reviewable by writ of certiorari only."¹ Plaintiff provides no legal support to show that MCL 38.555 provides an *alternative* remedy to the CBA. We disagree with plaintiff's position.

¹ Writs of Certiorari have been replaced by Writs of Superintending Control.

Based on the well-established exhaustion of administrative remedies doctrine, *Sankar*, 160 Mich App at 474; *Grosse Pointe Farms Police Officers Ass'n*, 53 Mich App at 178, plaintiff should have first exhausted his remedies pursuant to the CBA. If unsuccessful, he could then request review by the circuit court by way of a writ of superintending control. Plaintiff's interpretation would allow him to avoid application of the CBA altogether, which is not consistent with the principles and laws regarding collective bargaining agreements. *Bonneville*, 190 Mich App at 476.

In the trial court, and partially on appeal, plaintiffs attempts to bifurcate the City and the Board. Plaintiff asserts that because the Board is not a party to the CBA, it cannot enforce the grievance procedures. We disagree with this conclusion. The City and plaintiff's union bargained for the CBA, and the Board was created with the sole purpose of managing and regulating the retirement provisions of the CBA. MCL 38.552(1). Plaintiff's attempt to cast the Board as a separate party that would need to contract with the City and the union is not convincing, particularly in light of plaintiff's lack of legal support for his theory. Thus, we conclude that the trial court did not err in granting defendants' summary disposition because plaintiff failed to exhaust his administrative remedies before filing suit.

Plaintiff next argues that the trial court erred in refusing to grant plaintiff's motion for superintending control and in ruling that the Board's retroactive decision regarding his pension credits violated the ex post facto clause of the Michigan Constitution. Issues raised, addressed, and decided by the trial court are preserved for appeal. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). These issues were unpreserved because they were not decided on by the trial court. Generally, review of unpreserved claims of error is disfavored. While appellate consideration of an issue raised before the trial court but not specifically decided by the trial court is not precluded, this proposition is based on the consideration that a party should not be punished for a trial court's omission. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Here, the trial court made no omission. Rather, the trial court decided the case on alternate grounds. Moreover, in initially denying defendants' motion for summary disposition on the merits of plaintiff's claim, the court indicated that it believed, minimally, that there was a question of fact regarding this issue. We do not believe it would be appropriate for the Court to decide these issues. The record has not been fully developed and no decision was made by the trial court regarding the merits of plaintiff's argument pursuant to the CBA. Accordingly, we decline to further address these issues.

Plaintiff next argues that the trial court erred in denying plaintiff's motions for reconsideration on the basis that plaintiff had presented the same issue already ruled upon by the court. We disagree. The grant or denial of a motion for reconsideration is reviewed for an abuse of discretion. *Corporan v Henton*, 282 Mich App 599, 605-606; 766 NW2d 903 (2009). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id.* (citation omitted).

The trial court did not abuse its discretion in denying plaintiff's motions for reconsideration. In denying plaintiff's motions for reconsideration, the trial court held that plaintiff "has merely presented the same issues already ruled on by the Court, either expressly or by reasonable implication[.]" The court further held that plaintiff failed to show palpable error or that a different disposition would result by correction of the mistake. MCR 2.119(F)(3).

Plaintiff argues that his motions for reconsideration included new facts and law, and that the court's failure to review these arguments was an abuse of discretion. We disagree.

We initially note that the additional arguments presented in plaintiff's motions for reconsideration that were unrelated to plaintiff's failure to pursue administrative remedies were not relevant on reconsideration, as the trial court based its disposition on that ground. The arguments that did address that issue were without merit, discussed *supra*. Moreover, the arguments, while perhaps providing different reasoning, still related to whether plaintiff was required to exhaust administrative remedies before commencing a lawsuit. Thus, the trial court did not abuse its discretion in stating that plaintiff presented the same issues ruled upon. Further, even assuming the court did abuse its discretion in ruling that plaintiff presented the same issues, the court also denied plaintiff's motions based on failure to show palpable error or that a different disposition would result by correction of the mistake, which plaintiff does not challenge. Accordingly, plaintiff's argument lacks merit.

Finally, plaintiff argues that the trial court abused its discretion in granting the City's motion for summary disposition. Plaintiff claims that because the City did not file a motion for reconsideration, the trial court improperly granted its motion for summary disposition. We disagree. Plaintiff's argument revolves around a claimed technicality in the trial court's procedural posture. Even assuming the City should have filed a motion for reconsideration, the trial court had the power to sua sponte grant summary disposition to the City based on the pleadings. MCR 2.116(I)(1) ("If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay."); *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly